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No. 83-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THEODORE KOEHLER, Warden,
Petitioner,

v.

TILDEN N. ENGLE,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether, assuming the state's retroactivity argument is considered despite the failure to raise it below, *Sandstrom* at least should apply retroactively to habeas cases in which the constitutional issue was raised in state court on direct review prior to *Sandstrom's* decisional date?

II. Whether Michigan has any procedural default rule barring consideration of defendant's habeas claim?

III. Whether presumed intent instructions which shifted the burden of persuasion to defendant on disputed factual issues can be harmless error?

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Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 Journal of Criminal Law and Criminology 421 (1980) 28

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COUNTER-STATEMENT OF THE CASE

Defendant was charged with willful, deliberate and premeditated murder.[1] At trial he flatly denied ever intending to kill the Deceased (263). He testified that for three days preceeding the killing, he drank almost continuously, consuming at least three fifths and several pints of whiskey plus beer (250-258). In addition, late on the afternoon of the third day, he ingested four librium pills, quadruple his prescribed dosage (256-258, 302). The next thing he fully recalled was waking up in jail (258). Of the interim he could only remember that "fur was flying in my face and I saw a man as if I saw Lantz [the Deceased], as if in a nightmare on the floor with the blood gushing from his mouth" (258). He did not deny shooting the Deceased, but steadfastly maintained that he had not known what he was doing (314-315).

Dr. Mary Ansley testified for the defense that as a result of mounting stress during the months preceeding the shooting, including the deaths of five close family members or friends, a suicide attempt by his wife and finally the loss of his job, Defendant had suffered a dissociative reaction mental breakdown on the night of the shooting (353-359). She testified that when such breakdowns occur, they are often accompanied by impaired perception, judgment and consciousness (357-358). She testified that while it was possible he knew what was happening when he shot the Deceased, in her judgment the combination of the alcohol and the severe mounting stresses he had experienced were sufficient to have blocked his consciousness to the point that he would not have been fully aware of what he was doing (359-360).

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[1] Michigan Compiled Laws § 750.316; Michigan Statutes Annotated § 28.548.

Defendant's nephew, Renus Engle, testified that when Defendant indicated at approximately 9:00 PM that he was going to kill a guy, he was not acting normally (I, 21).[1] He was crying, had a nervous pitch to his voice and the things he was saying did not make much sense (I, 21-26). When Renus tried to talk to him, he did not seem to be paying attention (I, 26). Never before had Renus seen Defendant acting this way (I, 21-22).

Donald Ambrose, a plant clerk, testified that when he told Defendant at approximately 9:35 PM that the Deceased was not in the office, Defendant just stood there looking at him until the phone rang, at which point Defendant said he would go find him (39-41). Ambrose was struck by the way Defendant said this without any hint of anger in his voice or demeanor and by the strange look in his eyes (47-48, 56). In Ambrose's words, he looked "so strange" (47). While not smelling any alcohol, Ambrose testified that Defendant looked like he might have been drinking (53).

William Richardson, an employee on the line, testified that Defendant and the Deceased engaged in what appeared to be a normal conversation for approximately five minutes before Defendant pulled out a gun and started firing (24-27). Richardson testified that his attention was drawn to Defendant just before the first shots were fired by the "strange" look in Defendant's eyes, a look which Richardson testified he had never seen before during the four years he had worked with Defendant (24-26).

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[1] The roman numeral "I" refers to a separately numbered transcript of the proceedings on July 6, 1973. The remainder of the transcripts are consecutively numbered and will be referred to by page number only.

Donald Ambrose testified that soon after hearing the shots, Defendant appeared in the office doorway with the gun just hanging from his hand (41-42, 49). He was quiet and sad, his movements were slow and he appeared confused (52). When security guard Samuel Mays arrived, Defendant voluntarily turned the gun over to him (43, 66). Mays testified that Defendant smelled of alcohol and was visibly unsteady on his feet (67, 77).

Detroit Police Officer Richard Ren arrived at the scene at 10:55 PM, approximately an hour after the shooting occurred (112). He testified that Defendant appeared too calm and emotionless for what had transpired (94-95). While admitting the shooting, Defendant said he came to the plant to try and get his job back and had neither intended nor planned to shoot the Deceased (107, 118-119).

Defendant testified at trial that he regularly carried the gun used in the shooting for self-protection following the shooting death of his best friend during a robbery in a nearby bar a few months earlier (208-212). He testified that he had no recollection of talking to Officer Ren at the scene and that the purported confession he gave the next day was composed by the interrogating officer (261, 307-311, 319-320). He testified that he was so sick with the shakes at the time that he did not know what it said when he signed it (320).

Defendant's brother testified that Defendant drank heavily following their mother's death, attempted suicide on at least one occasion and had been hospitalized for alcoholic seizures (542-545, 551-553).

Defense counsel argued in closing that Defendant had not planned to shoot the Deceased, was not really "there" when the shooting occurred and did not know right from wrong at the time, in addition to arguing that he had been possessed by an irresistible impulse (590, 614, 618-619).

Among the questions to which the prosecutor specifically addressed himself in closing were whether Defendant was so intoxicated that he lacked the specific intent necessary to sustain a conviction for willful, deliberate and premeditated murder and whether he knew right from wrong at the time (568-570, 577, 622). As outlined by the judge in his instructions, the questions facing the jury included whether defendant had been capable of forming a premeditated intent to kill and whether he knew what he was doing when he shot the Deceased (15a-18a).

On three separate occasions during closing arguments, the prosecutor urged the jury to rely on Defendant's acts in determining his intent, specifically referring on the last occasion to the presumption that "men are accountable for the reasonable consequences of their acts":

> "Look at his actions. Do his actions demonstrate the actions of somebody who didn't know what he was doing" (577).
>
> "How do you know what is in a man's mind? You don't—you—the only way you know what is in a man's mind is by looking at what he has done, the way he did it" (622).
>
> "[M]en are accountable for the reasonable consequences of their acts. If that be so, Tilden Neil Engle is account[able]" (635).

Regarding the question of intent, the judge instructed the jury that:

> "We of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" (13a).

After less than 90 minutes of deliberations, the jury returned a verdict of guilty as charged of willful, deliberate and premeditated murder (683-684).

Following affirmance of his conviction by the Michigan Court of Appeals,[3] Defendant wrote a pro se letter to the Michigan Supreme Court requesting the appointment of counsel to pursue his appeal. The request was granted, and the State Appellate Defender Office was appointed to prepare a delayed application for leave to appeal.[4] On July 6, 1977 counsel filed an application and brief in support raising the constitutional claim at issue here (22a-30a). On May 2, 1978 the Michigan Supreme court denied leave to appeal.[5] In order to shield against any argument that state remedies had not been exhausted, counsel refiled the same claim back in the Michigan Court of Appeals, which denied leave on August 30, 1978 "for lack of merit in the grounds presented."[6] Counsel thereupon refiled the claim in the Michigan Supreme Court.

On January 8, 1979 this Court granted certiorari in *Sandstrom* v. *Montana*, 439 US 1067; 99 S Ct 832; 59 LEd 2d 31 (1979). On March 5, 1979 the Michigan Supreme Court again denied Defendant leave to appeal on his constitutional claim.[7] On June 18, 1979 this Court issued its opinion in *Sandstrom*.

SUMMARY OF ARGUMENT

I. The State's argument that *Sandstrom* v. *Montana*, 442 US 510; 99 S Ct 2450; 61 LEd 2d 39 (1979), should not apply retroactively to Defendant's case was not raised in either the District Court or the Sixth Circuit and there-

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[3] *People* v. *Engle*, 61 Mich App 628; 233 NW2d 116 (1975).

[4] Unpublished Order, April 26, 1976. See Respondent's Brief in Opposition to Petition for a Writ of Certiorari, p 3a.

[5] *People* v. *Engle*, 402 Mich 929 (1978).

[6] Unpublished Order, August 30, 1978 (35a).

[7] *People* v. *Engle*, 406 Mich 870 (1979).

fore is not properly before this court. If the argument nevertheless is considered, it should be rejected at least for habeas cases like Defendant's in which the *Sandstrom* claim was raised in state court on direct review prior to *Sandstrom's* decisional date. No "principled reason", *United States* v. *Johnson*, 457 US 537, 547; 102 S Ct 2579; 73 LEd 2d 202 (1982), exists for treating such defendants differently than their counterparts whose cases by chance alone were still pending on direct review when *Sandstrom* was decided. Under the pre-*Johnson* three factor retroactivity balancing approach, *Sandstrom* should be given complete retroactive effect. Conclusive or burden-shifting presumed intent instructions relieve the prosecution of its burden of proving each element of the crime charged beyond a reasonable doubt and raise substantial questions regarding the reliability of the guilt-determining process. Past reliance on such instructions was not justified given the clear warning signs that they could not pass federal constitutional muster, and the effect on the administration of justice of applying *Sandstrom* retroactively has been grossly exaggerated.

II. Consistent with Michigan's established policy of liberally excusing procedural defaults, the Michigan Supreme Court has held that no contemporaneous objection need be made at trial to preserve *Sandstrom* errors for review. *People* v. *Wright and Perez*, 408 Mich 1, 30, n. 13; 289 NW2d 1 (1980). Both the Michigan Supreme Court and Court of Appeals have applied this rule to pre as well as post-*Wright* trials, and Michigan has no appellate procedural default rule barring consideration of claims not raised in the initial appeal as of right to the Court of Appeals.

III. Given the clear shift in the burden of persuasion which the presumed intent instructions in this case entailed, the degree of emphasis placed on the presumption

of intent by the prosecutor in his closing arguments, the materiality of the issue of intent and the presence of conflicting evidence on that point, the instructions were not harmless, regardless of which of the two competing approaches advocated by the plurality opinions in *Connecticut* v. *Johnson*, ___ US ___; 103 S Ct 969; 74 LEd 2d 823 (1983), is adopted.

ARGUMENT

I. Sandstrom At Least Should Apply Retroactively To Habeas Cases In Which The Constitutional Issue Was Raised In State Court On Direct Review Prior To *Sandstrom's* Decisional Date.

The State did not argue in either the District Court or the Sixth Circuit that *Sandstrom* v. *Montana*, 442 US 510; 99 S Ct 2450; 61 LEd 2d 39 (1979), should not apply retroactively to Defendant's case. That argument appears for the first time in the State's petition for certiorari. Absent exceptional circumstances, a claim not raised below will not be considered by this Court. E.g., *United States* v. *Lovasco*, 431 US 783, 788, n. 7; 97 S Ct 2044; 52 LEd 2d 752 (1977). In *United States* v. *Ortiz*, 422 US 891; 95 S Ct 2585; 45 LEd 2d 623 (1975), this Court refused to consider a belated retroactivity argument for this reason. *Id.*, 898. No exceptional circumstances have been demonstrated by the State that would justify departure from this well established rule, and the Court therefore should decline to consider the issue.

If considered, the State's argument should be rejected at least for habeas cases like Defendant's in which the *Sandstrom* issue was raised in state court on direct review prior to *Sandstrom's* decisional date.* No principled

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*As defined by this Court, direct review includes not only any appeal as of right to a state's intermediate appellate court, but also

basis exists for distinguishing between such defendants and those whose cases were pending on direct review when *Sandstrom* was decided.[9]

In *United States* v. *Johnson*, 457 US 537; 102 S Ct 2579; 73 LEd 2d 202 (1982), this Court took "the first step toward 'turning our backs on the ad hoc approach that has so far characterized our decisions in the retroactivity field and proceeding to administer the doctrine on principle'." *Id.*, at 562. The Court rejected the three factor balancing approach urged by the State here, which had resulted in such "a welter of incompatible rules and inconsistent principles", *id.*, at 546, and held that henceforth any decision construing the Fourth Amendment would be applied to all cases still pending on direct review when the decision was rendered. *Id.*, at 562. This reform has since been extended to Fifth Amendment decisions. *Mack* v. *Oklahoma*, ___ US ___; 103 S Ct 201; 74 LEd 2d 161 (1982).

One of the central themes sounded throughout *Johnson* was that of "[e]venhanded justice for similarly situated litigants". *Id.*, at 547, n. 10. Quoting from Justice Harlan's dissent in *Desist* v. *United States*, 394 US 244; 89 S Ct 1030; 22 LEd 2d 248 (1969), the Court stated:

> "[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a

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discretionary review by the state's highest court and this Court. See *United States* v. *Johnson*, 457 US 537, 542, n. 8; 102 S Ct 2579; 73 LEd 202 (1982). Defendant's constitutional claim was raised in his first discretionary appeal to the Michigan Supreme Court (22a-30a).

[9] *Sandstrom* already has been applied retroactively to cases pending on direct review when it was decided. E.g., *Heads* v. *Louisiana*, 444 US 1008; 100 S Ct 654; 62 LEd 2d 637 (1980), *Moye* v *Connecticut*, 444 US 983; 100 S Ct 199; 62 LEd 2d 129 (1979), *Whisenhunt* v. *Georgia*, 443 US 903; 99 S Ct 3094; 61 LEd 2d 871 (1979).

> principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law." *Johnson, supra* at 457 US 547-548.

Adherence to this fundamental precept requires that habeas petitioners who raised a *Sandstrom* claim on direct review in state court prior to *Sandstrom's* decisional date be granted the same relief as their counterparts whose cases by chance alone were fortunate enough to still be pending on direct review when *Sandstrom* was decided. There is no "principled reason" for distinguishing between these two groups of litigants. See Schwartz, *Retroactivity, Reliability And Due Process: A Reply to Professor Mishkin*, 33 University of Chicago Law Review 719, 731-734 (1966). As stated by this Court in *Johnson*, referring to all cases still on direct review:

> "If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it *nor should we affirm those which have rejected the very arguments we have embraced.*" *Id.*, at 457 US 555 (Emphasis added).

The unprincipled and inequitable nature of distinguishing between habeas and direct review litigants, all of whom have raised the same constitutional issue in state court on direct review, is sharply illustrated by this Court's recent decision in *Connecticut* v. *Johnson*, ___ US ___; 103 S Ct 969; 74 LEd 2d 823 (1983). In that case the defendant filed his appeal in state court in 1976, seven months before Defendant here raised his *Sandstrom* claim in the Michigan Supreme Court. Due to a problem in obtaining a complete transcript, however, the case was not argued until 1981. *Id.*, at 74 LEd 2d 829. Solely because of this freak delay, the case was pending on direct review when *Sandstrom* was decided. To apply *Sand-*

strom to such a case but not to Defendant's based on so fortuitous a circumstance would represent a serious departure from the norms of principled adjudication which this Court embraced in *Johnson*.

In addition to being unprincipled and unfair, such a distinction would provide a strong disincentive to the prompt and efficient litigation of appellate cases through the state courts. Defense attorneys would be well-advised to delay the direct appeal as long as possible through the use of new trial motions, motions for rehearing and the like so that if a favorable constitutional decision comes down, their client will be entitled to its benefit. Instead of promoting the prompt and final resolution of criminal cases, such a distinction would encourage further delay in a system that is already justly criticized as ponderously slow.

Legitimate concerns regarding the finality of criminal cases have prompted several past and current members of this Court to express the view that new constitutional decisions generally should not apply at all to habeas corpus cases. *Hankerson* v. *North Carolina*, 432 US 233, 246-248; 97 S Ct 2339; 53 LEd 2d 306 (1977). (Powell, J., concurring in the judgment), *Mackey* v. *United States*, 401 US 667, 675-695; 91 S Ct 1160; 28 LEd 2d 404 (1971) (Harlan, J., concurring in the judgment). Many of the concerns which have prompted these views lose much of their force, however, in cases such as this where the habeas petitioner has raised his constitutional claim in the state court on direct review. Not only is the number of petitioners fitting this category likely to be small, but in addition the most troublesome finality concern, that a prisoner may continually seek to relitigate his conviction on new grounds never before raised each time a new constitutional decision is announced, *Desist* v. *United*

States, *supra* at 394 US 261 (Harlan, J., dissenting), is not implicated.[10]

Instead of a step back into the morass of prior retroactivity law, the Court should take another step forward toward principled and evenhanded decision-making by holding that *Sandstrom* at least should apply retroactively to any case in which the constitutional issue was raised in state court on direct review prior to *Sandstrom's* decisional date. There is no principled basis for doing otherwise.

A more thorough analysis of the three factor balancing approach than that undertaken by the State in its brief establishes that under pre-*Johnson* retroactivity law *Sandstrom* should be given complete retroactive effect. Jury instructions creating conclusive or burden-shifting presumptions on an essential element of the crime substantially impair the reliability of the guilt-determining process and do raise serious questions about the accuracy of past cases in which they were given. Moreover, any reliance by state courts on the continuing validity of such instructions long has been unjustified given the clear warning signs that such instructions could not pass federal constitutional muster. The effect on the administration of justice of applying *Sandstrom* retroactively also has been grossly exaggerated.

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[10] Other concerns, such as the necessity of releasing prisoners for constitutional violations unrelated to their guilt or innocence, *Hankerson* v. *North Carolina*, *supra* at 432 US 246-248 (Powell, J., concurring in the judgment), are more properly analyzed as questions regarding the scope of the Great Writ than as questions of retroactivity law. See *Stone* v. *Powell*, 428 US 465; 96 S Ct 3037; 49 L Ed 2d 1067 (1976).

The State's argument that conclusive or burden-shifting instructions such as those condemned in *Sandstrom* do not substantially impair the reliability of the guilt-determining process because such instructions only raise a possibility that the jury's deliberative process was infected ignores the recognized probability that most jurors in fact would rely on the unconstitutional presumption. As this Court has twice noted, given a choice between relying on a presumption and the more difficult task of analyzing and evaluating the evidence, "there is no reason to believe the jury would have deliberately undertaken the more difficult task." *Sandstrom*, *supra* at 442 US 526, n. 13; *Connecticut* v. *Johnson*, *supra* at 74 LEd 2d 333 (Opinion of Blackmun, J.). The mere possibility that some jurors might not interpret the instructions in an unconstitutional manner is not sufficient to reduce the danger the instructions pose to an acceptable level. *Sandstrom*, *supra* at 442 US 519. In every prior case where a conclusive or burden-shifting instruction was given, the probability that it infected the jury's deliberative process is substantial.[11]

The devastating effect of such instructions is to relieve the prosecution of its constitutional burden of proving each element of the crime charged beyond a reasonable doubt. As stated by this Court in *In re Winship*, 397 US 358; 90 S Ct 1068; 25 LEd 2d 368 (1970), the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error" which provides "concrete substance for the presumption of

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[11] The Government's companion argument that such instructions could have an adverse effect on the deliberative process only where the issue of intent was closely drawn is a harmless error argument which has no analytical relevance to the question whether *Sandstrom* should be applied retroactively.

innocence—that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.*, at 397 US 363. When these vital safeguards are not rigorously observed, substantial doubts about the reliability of the guilt-determining process arise.

While the instructions condemned in *Sandstrom* may be less egregious than the explicit burden-shifting instructions in *Mullaney* v. *Wilbur*, 421 US 684; 95 S Ct 1881; 44 LEd 2d 508 (1975), they still pose a sufficient danger to the accuracy of past guilty verdicts to require that *Sandstrom* be accorded full retroactive effect. The line which the State attempts to draw between cases like *Mullaney*, which have been held fully retroactive,[12] and cases like *Sandstrom* is too fine given the context in which we are dealing—jury instructions affecting the prosecution's burden of proof beyond a reasonable doubt and, concomitantly, the presumption of innocence. *Sandstrom's* major purpose was to eliminate a practice which did substantially impair the reliability of the guilt-determining process and it therefore should be accorded full retroactive effect.[13]

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[12] *Hankerson* v. *North Carolina*, 432 US 233; 97 S Ct 2339; 53 LEd 2d 306 (1977). See also *Ivan V* v. *City of New York*, 407 US 203; 92 S Ct 1951; 32 LEd 2d 659 (1972), holding *In re Winship*, *supra*, fully retroactive.

[13] As the State concedes in its brief, all of the circuits which have addressed this issue have reached this result. Brief for Petitioner, p 10, n. 1. See *Guthrie* v. *Warden, Maryland Penitentiary*, 683 F2d 820, 823, n. 3. (CA 4, 1982), *Burton* v. *Bergman*, 649 F2d 428, 431, n. 3 (CA 6, 1981), vacated and remanded on other grounds, 456 US 953; 102 S Ct 2026; 72 LEd 2d 478 (1982), *Dietz* v. *Solem*, 640 F2d 126, 130 (CA 8, 1981).

Due regard for past reliance on conclusive or burden-shifting presumed intent instructions does not dictate a contrary result. Such reliance is entitled to weight only if justified, *Brown* v. *Louisiana*, 447 US 323, 335; 100 S Ct 2214; 65 LEd 2d 159 (1980) (Opinion of Brennan, J.), *Berger* v. *California*, 393 US 314, 315; 89 S Ct 540; 21 LEd 2d 508 (1969), and here it clearly was not. Long before Defendant's trial, in *Morissette* v. *United States*, 342 US 246; 72 S Ct 240; 96 LEd 288 (1952), this Court thoroughly condemned presumed intent instructions:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury.
>
> * * *
>
> It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.
>
> * * *
>
> A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudice a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary." *Id.*, at 342 US 274-275.

In the years following *Morissette*, the federal circuit courts of appeal repeatedly struck down conclusive and

burden-shifting presumed intent instructions analagous to those given in this case and *Sandstrom*. E.g., *Mann* v. *United States*, 319 F2d 404, 407-409 (CA 5, 1963), *Chappell* v. *United States*, 270 F2d 274, 279-280 (CA 9, 1959), *Wardlaw* v. *United States*, 203 F2d 884, 887 (CA 5, 1953). And in 1970 in *In Re Winship*, *supra*, this Court made clear that the requirement that the prosecution prove each element of the crime charged beyond a reasonable doubt was fully applicable against the states through the Due Process Clause of the Fourteenth Amendment. *Id.*, at 397 US 363-364.

Together these decisions gave more than fair warning that presumed intent instructions could not pass federal constitutional muster. This was recognized in Michigan as early as 1971, two years before Defendant's trial commenced. *People* v. *Pepper*, 36 Mich App 437, 447-451; 194 NW2d 67 (1971), (Levin, J., dissenting), reversed 389 Mich 317; 206 NW2d 439 (1973), *People* v. *Morrin*, 31 Mich App 301, 316-317 and accompanying footnotes; 187 NW2d 434 (1971). Courts which nevertheless continued to approve of and rely on such instructions did so without justification and cannot now claim a good faith reliance interest entitled to serious weight.

The effect on the administration of justice of applying *Sandstrom* retroactively also does not dictate a contrary result. The class of cases in which *Sandstrom* will require reversal is exceedingly narrow. First, the defendant must have elected to go to trial rather than plead guilty.[11] Second, the defendant must have chosen to be tried by a jury rather than by the court. Third, intent must have

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[11] As this Court has noted, studies estimate that as few as 15% of all felony defendants choose to take their case to trial. *Brady* v. *United States*, 397 US 742, 752, n. 10; 90 S Ct 1463; 26 LEd 2d 747 (1970).

been an essential element of the crime. Fourth, a *Sandstrom* type instruction must have been given. Fifth, the remainder of the instructions must not have contained curative language. Sixth, intent must have been an essential element of the crime of which the defendant was convicted. Seventh, state contemporaneous objection rules must not bar review. And eighth, under whatever harmless error test this Court adopts, the reviewing court must find that the error was not harmless. Together these hurdles will severely limit the number of cases in which a reversal will be required.

Lower courts will of course be required to review past cases brought before them to determine whether relief must be granted. If past experience is any guide, however, much of this work has already been completed. Typically, the number of collateral attacks generated by a new decision peaks in the years immediately following the decision and thereafter quickly declines. By the time this Court issues its decision in this case, nearly five years will have elapsed since *Sandstrom* was decided.

Given the extent to which a *Sandstrom* type instruction casts doubt on the reliability of the guilt-determining process, the highly dubious nature of any past reliance and the minimal additional burden on the administration of justice, under pre-*Johnson* retroactivity law *Sandstrom* should be accorded complete retroactive effect.

II. No Michigan Procedural Default Rule Bars Consideration Of Defendant's Habeas Claim.

Michigan long has applied a broad exception to its general procedural default rule that absent manifest injustice, the failure to object to an instruction at trial precludes appellate review. Where an erroneous or misleading instruction is given on an essential element of

the crime or a material aspect of the defense, the absence of a contemporaneous objection does not bar review. E.g., *People* v. *Lenkevich*, 394 Mich 117, 122-123; 229 NW2d 298 (1975); *People* v. *Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967); *People* v. *MacPherson*, 323 Mich 438, 447-453; 35 NW2d 376 (1949). As stated by the Michigan Supreme Court in *Lenkevich*, rejecting the prosecution's contention that a lack of sufficient prejudice and the absence of a contemporaneous objection required affirmance of the defendant's conviction:

> "The rule is well settled in this State that if an erroneous instruction is given on a material matter and the error is not corrected or cured in the charge such error must be regarded as prejudicial.
>
> * * *
>
> It is settled law of this State that the trial judge should instruct the jury in criminal cases as to general features of the case, define the offense and indicate that which is essential . . . to establish the offense even in the absence of a request." *Id.*, at 123.

This exception applies to erroneous instructions on intent. E.g., *People* v. *Bowen*, 10 Mich App 1, 18-20; 158 NW2d 794 (1968). And long before Defendant's constitutional claim was presented to the Michigan courts, the Michigan Supreme Court had held that no objection was required to preserve for review instructions which established a conclusive presumption or shifted the burden of proof to the defense. *People* v. *Guillet*, 342 Mich 1, 3-8; 69 NW2d 140 (1955) [conclusive presumption of intent], *People* v. *McCoy*, 392 Mich 231, 235; 220 NW2d 456 (1974) [burden-shifting alibi instructions].

Consistent with this established policy of liberally excusing procedural defaults, the Michigan Supreme Court held in its first case addressing *Sandstrom* that no con-

temporaneous objection was required at trial to preserve *Sandstrom* errors for review. *People* v. *Wright and Perez*, 408 Mich 1, 30, n. 13; 289 NW2d 1 (1980). Despite the absence of an objection at this pre-*Sandstrom* trial to burden-shifting instructions on presumed intent, the Court held that the standard for determining whether reversal was required was the ordinary harmless error test established by this Court in *Chapman* v. *California*, 386 US 18; 87 S Ct 824; 17 LEd 2d 705 (1967), not the manifest injustice standard applied in cases involving a procedural default. *Wright*, *supra* at 26-29. While the Court did indicate that one reason for its holding was to deter future use of the instructions, the Court did not limit application of its decision only to future cases. *Id.*, at 30, n. 13.

Subsequent Michigan cases directly contradict the notion that *Wright* only was intended to relax state procedural default rules for post-*Wright* cases. In *People* v. *Hawley*, 112 Mich App 784; 317 NW2d 564 (1982), cited by the State for the proposition that burden-shifting instructions given prior to *Wright* were subject to normal procedural default rules, Brief for Petitioner, p 17, the Michigan Court of Appeals did hold in a case involving a pre-*Wright* trial that the failure to object to such an instruction precluded relief in the absence of a miscarriage of justice. *Hawley*, *supra* at 787. The State fails to point out, however, that subsequently the Michigan Supreme Court reversed the Court of Appeals' decision by order, citing *Wright* and holding that the erroneous instructions were not harmless beyond a reasonable doubt. *People* v. *Hawley*, 417 Mich 975 (1983). This action cannot be reconciled with the State's position that *Wright* was only meant to apply to post-*Wright* cases.

The State's argument that Defendant's failure to raise his constitutional claim in his initial appeal as of right to the Michigan Court of Appeals constituted an additional default was never raised in either the District Court or the Sixth Circuit. It therefore is not properly before this Court. E.g., *United States* v. *Lovasco*, 431 US 783, 788, n. 7; 97 S Ct 2044; 52 LEd 2d 752 (1977), *United States* v. *Oritz*, 422 US 891, 898; 95 S Ct 2585; 45 LEd 2d 623 (1975). Even if it is considered, however, it is totally without merit.

In *People* v. *George*, 375 Mich 262; 134 NW2d 222 (1965), Brief for Petitioner, p. 15, the first case cited by the State in support of this argument, the Michigan Supreme Court only held that issues raised in the questions presented section of the defendant's brief but not argued in the body of the brief would not be considered. *Id.*, at 264. In *People* v. *Tubbs*, 64 Mich App 341; 236 NW2d 77 (1975), the only other case cited by the State, a single judge did suggest an initial appeal procedural default rule. *Id.*, at 344-348. The State neglects to mention, however, that this was only a concurring opinion. The majority refused to consider such a rule, noting that the Michigan Supreme Court earlier in the same case had specifically rejected it, and reviewed the issues raised in the defendant's delayed application for leave to appeal on the merits, despite the fact that they had not been raised in the initial appeal. *Id.*, at 342-343.

Recent Michigan decisions involving *Sandstrom* claims not raised at trial or in the initial appeal as of right confirm that no state procedural default rule bars consideration of Defendant's claim. In *People* v. *Gibson*, 417 Mich 909 (1983), the Michigan Supreme Court considered a delayed application for leave to appeal which raised a *Sandstrom* error for the first time. Nevertheless, the Court reman-

ded the case to the Court of Appeals by order for consideration of the issue on the merits. On remand, the Court of Appeals reversed. *People* v. *Gibson*, ___ Mich App ___; ___ NW2d ___ (No. 70122, publication granted Sept. 21, 1983). Regarding the lack of objection and the failure to previously raise the issue, the Court stated:

> "It should be noted that the defendant did not object to the trial judge's instructions, nor did she raise any such issue on appeal. This is understandable as the trial was conducted August 31, 1979, and *People* v. *Wright*, 408 Mich 1; 289 NW2d 1 (1980), was decided March 4, 1980." *Gibson*, *supra* at slip opinion p. 1.

Similarly, in *People* v. *Plozai*, 125 Mich App 107; ___ NW2d ___ (1983), the Michigan Court of Appeals considered a delayed application for leave to appeal which for the first time raised a *Sandstrom* claim. The Court addressed the issue on the merits and reversed, despite the defendant's failure to raise the issue in his initial appeal to that Court in 1973. *Id.*, at 109.

In *People* v. *Woods*, 416 Mich 581; 331 NW2d 707 (1982), cited by the State in support of its procedural default argument, Brief for Petitioner, p 17, the Michigan Supreme Court held as a matter of federal constitutional law that *Sandstrom* need not be given complete retroactive effect. *Woods*, *supra* at 615-622. The State cannot by appellate alchemy transform *Woods* into a state law decision on the applicability of Michigan's procedural default rules.

Absent a demonstration by the State that Michigan has an applicable procedural default rule barring consideration of Defendant's habeas claim, the cause and prejudice requirements of *Wainwright* v. *Sykes*, 433 US 72; 97 S Ct 2497; 53 LEd 2d 594 (1974), do not apply. *County Court of Ulster* v. *Allen*, 442 US 140, 147-154; 99 S Ct 2213; 60 LEd

2d 777 (1979). As concluded by the Magistrate below, there is "no indication" that the Michigan courts relied on any procedural default in rejecting Defendant's constitutional claim. Magistrate's Report, p 7, n 3.

III. The Trial Court's Presumed Intent Instructions Clearly Shifted The Burden Of Persuasion To Defendant On Disputed Factual Issues And Were Not Harmless Error.

The trial court's instruction that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" is not meaningfully distinguishable from the unconstitutional presumed intent instruction condemned by this Court in *Sandstrom* v. *Montana*, 442 US 510; 513; 99 S Ct 2450; 61 LEd 2d 39 (1979), that "the law presumes that a person intends the ordinary consequences of his voluntary acts."[13] As explained by Judge Contie for the unanimous panel in this case, a "rule of thumb" in common parlance is a directive that generally is to be followed unless grounds for departing from the rule are shown. *Engle* v. *Koehler*, 707 F2d 241, 245 (CA6, 1983). This colloquial and common sense phrasing of the instruction actually increased the risk of error by increasing the likelihood that lay jurors, unfamiliar and uncomfortable with legal jargon, would recall and rely on the presumption in their deliberations.

The unconstitutional effect of this presumed intent instruction was aggravated by the instruction a few lines before it that "malice is implied from any deliberate and cruel act against another person, however sudden," and by the instruction immediately following it that "[i]t is

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[13] According to Webster's a "rule of thumb" is "a rule based on experience or practice," and to "presume" is to "accept as true lacking proof to the contrary." Websters New World Dictionary (2d ed, 1972).

somewhat like the old saying that actions speak louder than words" (13a). The former was unqualifiedly stated as a conclusive presumption, and the latter reinforced the idea that intent should be determined from the nature of Defendant's acts. Given that Defendant's defense rested primarily on the "words" he and his psychiatrist had spoken at trial, this latter instruction was particularly devastating, and its colloquial phrasing again increased the likelihood that the jurors would remember and rely on it in their deliberations.

The remainder of the judge's charge on the question of intent did not ameliorate the unconstitutional effect of these instructions. To the contrary, the rest of the instructions specially directed the jury's attention to three undisputed facts in the case the natural consequence of which was death—the use of a deadly weapon,[16] the number and location of the wounds inflicted[17] and evidence of close range firing[18]—any one of which would have been sufficient to trigger the presumption of intent that the judge had just described (13a-14a). Read together with the reasonable doubt instruction which concluded this section of the judge's charge, a rational juror would almost certainly have concluded that proof of these acts was sufficient to raise a presumption of intent satisfying the prosecution's burden on this element unless defendant proved otherwise.

The instructions given regarding the defense of insanity further aggravated the error. The judge told the

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[16] A .38 caliber Smith and Wesson revolver (123-125).

[17] Four gunshot wounds, one each to the head, abdomen, back and arm (I, 37-44).

[18] The shot to the abdomen was fired at close range (I, 42-43).

jurors that the prosecution was entitled to a "presumption" that Defendant was sane, and then defined the quantum of evidence that must be introduced to overcome this presumption as evidence "creating a reasonable doubt of insanity:"

> "Now, in many criminal cases no question of insanity is ever raised because the Prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts. The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. *When evidence of sanity is introduced, creating a reasonable doubt of insanity, the State has the burden of proving sanity beyond a reasonable doubt.*" (18a, emphasis added).

Moreover, with regard to Defendant's particular defense of dissociative reaction mental illness, the judge told the jury:

> "Where this [condition] can be proved it would constitute a defense" (18a).

Instructions requiring that the accused "prove" his defense or introduce evidence "creating a reasonable doubt" on the issue before the prosecution will be put to its proofs do more than merely shift the burden of production. They shift the burden of persuasion and are unconstitutional. *Sandstrom, supra* at 442 US 515-518. Contrary to the State's assertion that the insanity instructions

cured any error, Brief for Petitioner, p 25, they in fact compounded it.[19]

Read in context, *Cupp* v. *Naughten*, 414 US 141; 94 S Ct 396; 38 LEd 2d 368 (1972), the judge's instruction that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" resulted in a more egregious constitutional violation than that in *Sandstrom*, with a correspondingly greater potential for prejudice.

This potential was magnified by the degree of emphasis placed on the presumption of intent by the prosecutor throughout his closing arguments. On no less than three separate occasions he urged the jury to rely on Defendant's acts in determining the question of intent, using language virtually identical to that which the judge would eventually use in his instructions (577, 622, 635). This confluence of prosecutorial arguments and judicial instructions carries a powerful synergistic impact which is almost certain to make a substantial impression on the jury.[20] Given this emphasis by the prosecutor, there is every reason to believe that the jury would have noted and relied on the presumption.

The potential for prejudice was further magnified by the fact that the existence of the requisite mens rea was

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[19] The judge's instructions regarding the defense of intoxication similarly established a presumption in the prosecution's favor. The judge told the jurors that:

> "[T]he law presumes the defendant to have intended the disturbance or obscuration of his faculties which followed his voluntary intoxication. He must be held to have purposely blinded his moral perception and set his will free from control of reason and he should, therefore, be held responsible, as well, for the vicious excesses of the will thus set free as for the acts done by its prompting" (15a).

[20] See Traynor, *The Riddle of Harmless Error* (1970), p 75.

one of the disputed factual issues with which the jury was confronted. Contrary to the State's assertion that the only question facing the jury was whether Defendant nad been possessed by an irresistible impulse, Brief for Petitioner, pp 27-28, Defendant flatly denied ever intending to kill the Deceased and the evidence presented, arguments of counsel and instructions by the judge squarely raised the issue of whether, as a result of drug and alcohol intoxication and a dissociative reaction mental breakdown, Defendant's conscious mind had been blocked to the point that he did not know what he was doing. If he did not know what he was doing, and hence did not know he was doing wrong, or if the jurors entertained a reasonable doubt on this subject, he was entitled under then prevailing Michigan law to an acquittal by reason of insanity on all charges. *People* v. *Martin*, 386 Mich 407, 415-419; 192 NW2d 215 (1972). The judge's instruction on presumed intent relieved the prosecution of its burden of proving the requisite mens rea beyond a reasonable doubt and thereby seriously prejudiced a fair consideration of this disputed factual issue. As stated by one Michigan Court under analogous circumstances:

> "The issue at trial was defendant's sanity at the time of the offense. Once raised, the burden was on the prosecution to prove defendant's sanity beyond a reasonable doubt. Although distinct, the issues of intent and sanity are sufficiently intertwined so that the trial court's instruction that 'you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts' and that 'that law presumes that every man intends the legitimate consequences of his own acts' could have effectively shifted the burden on the issue of sanity to the defendant. At worst, these instructions could have been considered by the jury as negating an insanity defense altogether." *People* v. *Broadnax*, 111 Mich

App 46, 49-50; 314 NW2d 522 (1981), lv den 412 Mich 936 (1982).

Fair consideration of the related question whether Defendant was too intoxicated to have formed a premeditated intent to kill was similarly prejudiced by the presumed intent instructions.

The potential for prejudice was further magnified by the presence of conflicting evidence regarding Defendant's mental state at the time of the shooting. As the Sixth Circuit correctly summarized the record:

> "Engle admitted that he killed Lantzy but denied having the requisite mens rea to sustain a murder conviction because of the combined effects of intoxication, the librium pills and mental disease. The evidence concerning these claims was conflicting. For instance, the petitioner and Dr. Ansley testified in a manner supporting the defense of dissociative reaction while Dr. Edgar testified to the contrary. To some witnesses, Engle appeared calm and coherent near the time of the shooting; to others he appeared to be distraught and possibly under the influence of alcohol." *Engle* v. *Koehler*, *supra* at 707 F2d 246.

Faced with such conflicting evidence, the danger that the jurors would turn to and rely on the presumption of intent to ease resolution of the dispute was great. There is "no reason to believe the jury would have deliberately undertaken the more difficult task" of evaluating the evidence when they could instead rely on the presumption. *Connecticut* v. *Johnson*, *supra* at 74 LEd 2d 833 (Opinion of Blackmun, J.); *Sandstrom* v. *Montanta*, *supra* at 442 US 526, n. 13.

Given the clear shift in the burden of persuasion that the presumed intent instructions entailed, the degree of emphasis placed upon the presumption of intent by the

prosecutor in his closing arguments, the material nature of the issue of intent and the presence of conflicting evidence on that point, it would "indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide." *Bollenbach* v. *United States*, 326 US 607, 614; 66 S Ct 402; 90 LEd 350 (1946).

When a jury "is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict." *Chapman* v. *California*, 385 US 18, 44; 87 S Ct 824; 17 LEd 2d 705 (1957) (Stewart, J., concurring in the result). As stated by Justice Frankfurther for the Court in *Bollenbach* v. *United States*, *supra*, rejecting the Government's argument that the evidence of guilt rendered harmless an unreasonable burden-shifting presumption:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . . *Id.*, at 326 US 614.[21]

The "weight of the evidence" approach urged by the State, Brief for Petitioner, pp 28-29, is totally inappropri-

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[21] See Traynor, *supra* at 73-74:

> "[W]e must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case. If an erroneous instruction or an erroneous failure to give an instruction relates to a substantial element of the appellant's case, an appellate court would not find it highly probable that the error did not influence the verdict."

ate where, as here, there is conflicting evidence on the issues to which the erroneous instructions relate. As stated by Justice Black for the Court in *Weiler* v. *United States*, 323 US 606, 611; 65 S Ct 548; 89 LEd 495 (1945):

> "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."[2]

The nearly unanimous weight of authority of those commentators who have addressed the question agree that a reviewing court which attempts to resolve such conflicts or affirms despite them on the basis of "overwhelming evidence" does exceed its proper and legitimate function. Traynor, *supra* at 20-22; Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process In Need of a Rationale*, 125 University of Pennsylvania Law Review 15, 32-35, 46-47, 53 (1976); Note, *Harmless Error: The Need for a Uniform Standard*, 53 St. John's Law Review 541, 560-561 (1979), Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 Journal of Criminal Law and Criminology 421, 429-430 (1980).

The ultimate resolution of the *Sandstrom* case itself provides an instructive analogy for how the case at bar should be resolved. As the District Court conceded in its opinion, the facts in *Sandstrom* and this case are "remarkably similar."[3] In *Sandstrom*, as here, the ac-

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[2] Accord, *Bumper* v. *North Carolina*, 391 US 543, 550, n. 16; 88 S Ct 1788; 20 LEd 2d 797 (1968), *Kotteakos* v. *United States*, 328 US 750, 763-764; 66 S Ct 1239; 90 LEd 1557 (1946).

[3] See District Court Opinion, Petition for Certiorari, p 6a.

cused confessed to the homicide.[4] The killing was admitted at trial, and the defense argued on the basis of psychiatric testimony and evidence of intoxication that the accused had not acted knowingly and purposefully. The jury rejected this argument and returned a guilty verdict on the charged offense of deliberate homicide. On the basis of a single one line presumed intent instruction less egregious under all the circumstances than the one given here, this Court reversed and remanded the case to the Montana Supreme Court for consideration of whether the erroneous instruction could be held harmless. On remand that Court unanimously held that it could not. Given that the accused's intent was the principal issue at trial and an essential element of the prosecution's proofs, the Court was unable to assert that "the offensive instruction could not reasonably have contributed to the jury's verdict." *State* v. *Sandstrom*, 184 Mont 391; 603 P2d 244, 245 (1979).

Regardless of which of the two competing approaches advocated by the plurality opinions in *Connecticut* v. *Johnson*, *supra*, is adopted, the error in this case was not harmless. The State cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, *supra* at 385 US 24. Under all the facts and circumstances, "there is a reasonable possibility that the [error] might have contributed to the conviction." *Id.*, at 23.

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[4] Sandstrom admitted striking the wheelchair bound victim in the back of the head with a shovel and then stabbing her five times in the back with a knife. U.S. Supreme Court Records and Briefs, Docket No. 78-5384, Appendix pp 10-11.

CONCLUSION

For these reasons, Respondent respectfully requests that the judgment of the Sixth Circuit be AFFIRMED.

Respectfully submitted,

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